

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 12, 2014

KATHYRNE KENNEDY v. KARL E. CHILDS

**Appeal from the Juvenile Court for Montgomery County
No. 113318 Raymond Grimes, Judge**

No. M2014-00093-COA-R3-JV – Filed March 30, 2015

This appeal involves Father’s petition for child support modification and his petition for rehearing regarding a magistrate’s finding of criminal contempt. At issue are the juvenile court’s findings that Father failed to demonstrate a significant variance necessary for the modification of child support; the confirmation of the magistrate’s order finding Father guilty of criminal contempt for willful failure to pay child support; and the court’s decision to only excuse three months of Father’s child support arrearages. We conclude that the trial court erred in calculating Father’s and Mother’s monthly gross incomes on the child support worksheet but that the record is otherwise insufficient to address the issues raised by Father. Therefore, we affirm in part, vacate in part, and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part, Vacated in Part, and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Karl E. Childs, Clarksville, Tennessee, appellant, Pro Se.

No brief filed on behalf of appellee, Kathyrne Kennedy.

OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

This case involves a petition for modification of child support. Karl Childs (“Father”) was originally ordered to pay \$547.00 per month to Kathyrne Kennedy (“Mother”) for the support of the couple’s minor child, Khamil C., on August 7, 2008. On

September 6, 2011, Mother filed a petition with the Montgomery County Juvenile Court, alleging that there had been a “significant variance between the Tennessee Child Support Guidelines and the amount of child support currently ordered, such that a modification in child support is justified.” The case was heard before a magistrate on February 23, 2012. The magistrate held Father accountable for 54% of Khamil’s medical expenses and found the necessary 15% variance in obligation to support a modification of child support. Tenn. Comp. R. & Regs. 1240-2-4-.05 (2015). The magistrate ordered Father to pay \$313 per month in child support and an additional \$20 per month toward arrearages.

Father was also found in willful contempt for failure to pay child support and sentenced to ten days in the Montgomery County Jail. The magistrate “stay[ed] all days based upon strict compliance” and set a review date for November 8, 2012. Father did not request a rehearing before the juvenile court on either the child support modification or contempt issue within the statutorily prescribed five-day period, Tennessee Code Annotated § 36-5-405(h) (2014), and so the court adopted the magistrate’s finding as its order.

At the November 8, 2012 hearing to review Father’s compliance with child support payments, the magistrate found that Father owed \$7,029.63 in arrears and ordered him to “continue to pay toward arrears as previously ordered.” At a subsequent review hearing held on October 31, 2013, the magistrate ordered Father to serve the previously imposed ten-day sentence.

Father filed a request for rehearing in front of the juvenile court judge on the same day.¹ He filed an affidavit of indigency and was appointed an attorney to represent him in the criminal contempt proceeding before the juvenile court. Father also filed a petition for modification of child support on December 12, 2013, requesting a downward adjustment of his current child support obligation of \$313.00 per month.

The juvenile court conducted a hearing on Father’s request for child support modification and the magistrate’s findings of criminal contempt on January 6, 2014. Relative to the child support issue, the court found that Father had another child residing with him. Although Father was an unemployed student at the time of the hearing, the court imputed income to him at the “minimum wage standard.” Mother testified that she earned \$8.00 per hour. Despite having 80 days of overnight visitation per year, the court expressed doubts that Father had actually exercised that visitation.

¹ Both Tennessee Code Annotated § 37-1-107(e) (2014) and Tennessee Rule of Juvenile Procedure 4(c)(1) permit any party to request a rehearing before a juvenile court judge of certain matters heard by a magistrate.

Based on these findings and the child support worksheet, the court declined to modify the previous child support order. The court concluded that there was not a 15% variance between the Tennessee Child Support Guidelines and Father's child support obligation. Significantly, the child support worksheet attached to the court's order calculated Mother's monthly gross income at \$1,256.66 per month and set Father's monthly gross income at \$1,386.00 per month. The court also confirmed the magistrate's ruling regarding willful contempt and imposed a ten-day jail sentence to be served on five consecutive weekends at the Penal Farm of Montgomery County beginning on January 10, 2014.

II. ANALYSIS

Father raises four issues on appeal: (1) whether the trial court erred in calculating his child support obligation; (2) whether the trial court erred in failing to designate Father as a "low income provider" eligible for a child support modification under a 7.5% variance in obligation; (3) whether the court erred in finding him in criminal contempt; and (4) whether the court erred in refusing to excuse certain child support arrearages.

A. Standard of Review

Child support obligations are determined according to the Tennessee Child Support Guidelines, but trial courts have discretion to grant credits or otherwise deviate from presumptive child support obligations. *Reeder v. Reeder*, 375 S.W.3d 268, 275 (Tenn. Ct. App. 2012) (citing *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)). We will not interfere with the trial court's discretionary decisions except upon a showing of abuse of that discretion. *See, e.g., Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (Tenn. 2013); *Reeder*, 375 S.W.3d at 275. A trial court abuses its discretion only where it: applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Kline v. Eyrich*, 69 S.W.3d 197, 203-04 (Tenn. 2002); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

When reviewing a lower court's discretionary decision, we must determine: "(1) whether the factual basis for the decision is properly supported by evidence in the record; (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision; and (3) whether the lower court's decision was within the range of acceptable alternative dispositions." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). We review the trial court's findings of fact de novo on the record, with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *see also, e.g., Armbrister*, 414 S.W.3d at 692. The trial court's

conclusions of law are reviewed de novo, with no presumption of correctness. *Armbrister*, 414 S.W.3d at 692.

B. Modification of Child Support and Father’s Designation as a “Low Income Provider”

Father argues that the juvenile court miscalculated Father’s and Mother’s respective gross monthly incomes on the child support worksheet, resulting in two errors. First, he argues that he should be designated a “low income provider”² under the Guidelines, making him eligible for a child support modification upon the finding of a 7.5% variance in obligation. Second, he contends that, had Father’s and Mother’s respective incomes been correctly calculated, a 15% variance justifying modification would have existed in any event.

Modification of child support is governed by Tennessee Code Annotated § 36-5-101(g) (2014), which states, in pertinent part:

(1) Upon application of either party, the court shall decree an increase or decrease of support when there is found to be a significant variance, as defined in the child support guidelines established by subsection (e), between the guidelines and the amount of support currently ordered, unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances that caused the deviation have not changed. . . .

Tenn. Code Ann. § 36-5-101(g)(1). The Guidelines define a “significant variance” in an

² For purposes of child support modification, the Guidelines define a “low income provider” as a person who:

1. Is not willfully and voluntarily unemployed or underemployed when working at his/her full capacity according to his/her education and experience; and
2. Has an Adjusted Gross Income at or below the federal poverty level for a single adult.
 - (i) As of the effective date of the rules, the federal poverty level for a single adult is ten thousand four hundred dollars (\$10,400) annual gross income, which shall remain in effect until updated by the Department.
 - (ii) Updated information regarding the federal poverty standards will be available on the Department’s website at www.state.tn.us/humanserv.

Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(d).

order entered or modified January 18, 2005, or after, as is the case here, as:

at least a fifteen percent (15%) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order or, if the tribunal determines that the Adjusted Gross Income of the parent seeking modification qualifies that parent as a low-income provider, at least a seven and one-half percent (7.5% or 0.075) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order.

Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(c). A parent seeking modification bears the burden of proving that a significant variance exists. *Wine v. Wine*, 245 S.W.3d 389, 394 (Tenn. Ct. App. 2007).

“The integrity of a child support award is dependent upon the trial court’s accurate determination of both parents’ gross income.” *Milam v. Milam*, No. M2011-00715-COA-R3-CV, 2012 WL 1799029, at *3 (Tenn. Ct. App. May 17, 2012). Therefore, we begin with a careful examination of the figures shown on the child support worksheet.³ The court found that Mother was making \$8.00 per hour and imputed Father’s income at “minimum wage standard”—\$7.25 per hour. 29 U.S.C.A. § 206 (Supp. 2014). However, despite the court’s findings that Mother was making \$ 0.75 per hour more than Father, the child support worksheet set Mother’s monthly gross income at \$1,256.66 and Father’s monthly gross income at \$1,386.00, a \$129.34 difference in favor of Mother. The juvenile court appears to have transposed Mother’s and Father’s respective gross monthly incomes on the child support worksheet.⁴

The transposition of Mother’s and Father’s monthly gross incomes impacts both issues raised by Father. The court’s order found that Father’s other minor child was residing with him at the time of its decision. The federal poverty line for a household of two in 2014 was \$15,730.00. Annual Update of the HHS Poverty Guidelines, 70 Fed.

³ The Tennessee Child Support Guidelines require that “[t]he completed worksheets must be maintained as part of the official record either by filing them as exhibits in the tribunal’s file or as attachments to the order.” Tenn. Comp. R. & Regs. 1240-2-4-.04(1)(e).

⁴ An income of \$7.25 per hour was imputed to Father. Based on a standard forty-hour work week, at \$7.25 per hour, multiplied by 52 weeks in a year, and then divided by 12 months, Father’s monthly gross income would be \$1,256.66—the amount entered as Mother’s monthly gross income on the child support worksheet. Mother was making \$8.00 per hour. Multiplying the hourly wage by 40 hours per week, then 52 weeks, and dividing the product by 12 months equals a monthly gross income of \$1,386.66—or \$ 0.66 more than the income imputed to Father in the child support worksheet.

Reg. 3593-94 (Jan. 22, 2014). Under a standard 40 hour work week, Father would need to earn a gross hourly income of \$7.56 to rise above the federal poverty line. As such, Father would be considered a “low income provider” under the Child Support Guidelines and eligible for a child support modification upon the showing of a 7.5% variance. In this case, even were Father not a “low income provider,” Father’s imputed income would likely result in a significant variance between the guidelines and the previously ordered support to justify a modification.

As the trial court seems to have relied on an erroneous assessment of the evidence by transposing Mother’s and Father’s monthly gross incomes on the child support worksheet, we vacate these findings, and remand for a redetermination of Father’s child support obligation. See *Hill v. Hill*, No. M2011-02253-COA-R3-CV, 2012 WL 4762110, at *4-5 (Tenn. Ct. App. Oct. 5, 2012) (vacating and remanding a child support order for redetermination where the court made a mathematical error in calculating income); *Milam*, 2012 WL 1799029, at *1 (vacating a child support award and remanding for redetermination of the appropriate amount under the child support guidelines where the trial court erred in calculating a father’s income).

C. Criminal Contempt and Child Support Arrearages

We are unable to address the substance of Father’s remaining two issues due to the inadequacy of the record. Neither a transcript nor a statement of the evidence was submitted for the numerous hearings held by the magistrate or the hearing before the juvenile court.⁵ Father is appearing before us pro se, and he is “entitled to the fair and equal treatment of the courts.” *Chiozza v. Chiozza*, 315 S.W.3d 482, 487 (Tenn. Ct. App. 2009). However, “[p]ro se litigants are not . . . entitled to shift the burden of litigating their case to the courts.” *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). A pro se litigant must comply with the same substantive and procedural rules as those represented by counsel. *Chiozza*, 315 S.W.3d at 487.

Tennessee Rule of Appellate Procedure 24 requires the appellant to prepare a record conveying a “fair, accurate, and complete account” of what happened at trial so that we may evaluate the issues raised on appeal. Tenn. R. App. P. 24; *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005). “The appellant also has the burden to provide this Court with a transcript of the evidence or a statement of the evidence from which we can determine whether the evidence preponderates for or against the findings of the trial court.” *In re M.L.D.*, 182 S.W.3d at 894-95. Furthermore, the recitation of facts and arguments

⁵ Father filed a motion to supplement the record with an audio recording of the juvenile court proceedings on April 4, 2014. However, Tennessee Rule of Appellate Procedure 24 does not allow the substitution of an audio recording for a verbatim written transcript of the evidence or written statement of the evidence.

contained in briefs do not constitute evidence that we may consider in lieu of evidence properly entered into the record. *Reid v. Reid*, 388 S.W.3d 292, 295 (Tenn. Ct. App. 2012); *Flack v. McKinney*, No. W2009-02671-COA-R3-CV, 2011 WL 2650675, at *2 (Tenn. Ct. App. July 6, 2011). Thus, where no transcript or statement of the evidence is available, we must conclusively presume that the trial court's findings are supported by the evidence. *Chiozza*, 315 S.W.3d at 492; *In re M.L.D.*, 182 S.W.3d at 895; *Word v. Word*, 937 S.W.2d 931, 932 (Tenn. Ct. App. 1996); *Leek v. Powell*, 884 S.W.2d 118, 121 (Tenn. Ct. App. 1994); *Flack*, 2011 WL 2650675, at *3.

The technical record before us does not reveal any error in relation to the juvenile court's decisions regarding the criminal contempt issue or the arrearages assessed against Father. Therefore, in light of the presumption that the juvenile court's findings are supported by the evidence, we affirm the juvenile court's decisions on the criminal contempt and arrearages issues.

III. CONCLUSION

For the foregoing reasons, the judgment of the juvenile court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

W. NEAL McBRAYER, JUDGE